

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

HALL & ASSOCIATES,

Plaintiff,

v.

**U.S. ENVIRONMENTAL PROTECTION
AGENCY,**

Defendant.

Civil Action No. _____

INDEX OF EXHIBITS IN SUPPORT OF PLAINTIFF'S COMPLAINT

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Exhibit 1 –

2018 Request – EPA-HQ-2018-009605

HALL & ASSOCIATES

1620 I Street, NW
Suite 701
Washington, DC 20006-4033
Telephone: (202) 463-1166 Web: <http://www.hall-associates.com> Fax: (202) 463-4207
Email: bkirby@hall-associates.com

July 13, 2018

VIA FOIA ONLINE

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

RE: FOIA Request for EPA's Email Distribution List for the July 13, 2018 "Prepare for Harmful Algal Blooms" Email

To Whom This May Concern:

This is a request for public records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as implemented by the Environmental Protection Agency ("EPA") at 40 C.F.R. Part 2.

Background

On July 13, 2018, EPA's Water Security Division distributed an email with subject line "Prepare for Harmful Algal Blooms" (Attached).

Request

This request seeks:

1. An electronic copy of the email distribution list of those in receipt of the July 13, 2018 EPA "Prepare for Harmful Algal Blooms" email.

Please contact the undersigned if the associated search and duplication costs are anticipated to exceed \$100.00. If the requested email distribution list is withheld based upon any asserted privilege, please identify the basis for the non-disclosure.

If you have any questions regarding this request, please do not hesitate to contact this office so as to ensure that only the necessary electronic email distribution list is duplicated.

HALL & ASSOCIATES

Respectfully,

//s// Ben Kirby
Benjamin M. Kirby

HALL & ASSOCIATES

Attachment 1 –

EPA’s Water Security Division July 13, 2018 Email - “Prepare for Harmful Algal Blooms”

From: US EPA Water Security Division <wsd-outreach@epa.gov>

Sent: Friday, July 13, 2018 11:19 AM

To: John Hall <jhall@hall-associates.com>

Subject: Prepare for Harmful Algal Blooms

|

|

Algal Blooms - Is Your Utility Prepared?

Harmful Algal Blooms

Protecting Your Utility from Harmful Algal Blooms

Increasingly, utilities face harmful algal bloom or HAB challenges as they try to ensure the delivery of safe drinking water to their customers. HABs can create toxins that are difficult to treat, which can lead to prolonged drinking water outages that can impact both human health and a community's economy.



[Click here!](#) To check out this video and these tools to learn how to protect your utility and customers from harmful algal blooms.



[Incident Action Checklist for Water Utilities - Harmful Algal Blooms](#)

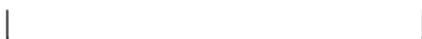
Drinking water and wastewater utilities can use this "rip & run" style checklist to help with harmful algal bloom emergency preparedness, response and recovery activities

.



[Response On-The-Go Mobile Application and Website](#)

EPA's new mobile app for iPhone and Android helps response personnel and water utility operators access key response information - including severe weather watches and warnings, emergency contacts, emergency checklists, damage assessment forms, and ICS resources - on your mobile device during an emergency.



US EPA, Water Security Division, 1200 Pennsylvania Ave, Washington, DC 20460

[SafeUnsubscribe™ jhall@hall-associates.com](#)

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Sent by wsd-outreach@epa.gov in collaboration with

[Try it free today](#)

Exhibit 2 –

2019 Request – EPA-HQ-2019-004343

HALL & ASSOCIATES

1620 I Street, NW
Suite 701
Washington, DC 20006-4033
Telephone: (202) 463-1166 Web: <http://www.hall-associates.com> Fax: (202) 463-4207
Email: ethomas@hall-associates.com

March 19, 2019

VIA FOIA ONLINE

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

**RE: FOIA Request for EPA's Email Distribution List for the February 14, 2019
"Announcing EPA's Water Quality Modeling Webinar: 'Conestoga River
Watershed HSPF and SWAT Modeling'" Email**

To Whom This May Concern:

This is a request for public records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as implemented by the Environmental Protection Agency ("EPA") at 40 C.F.R. Part 2.

Background

On February 14, 2019, EPA's Office of Water distributed an email with subject line "Announcing EPA's Water Quality Modeling Webinar: 'Conestoga River Watershed HSPF and SWAT Modeling'" (Attached).

Request

This request seeks:

1. An electronic copy of the email distribution list of those in receipt of the February 14, 2019 Office of Water's "Announcing EPA's Water Quality Modeling Webinar: 'Conestoga River Watershed HSPF and SWAT Modeling'" email (Attached).

Please contact the undersigned if the associated search and duplication costs are anticipated to exceed \$50.00. If the requested email distribution list is withheld based upon any asserted privilege, please identify the basis for the non-disclosure.

HALL & ASSOCIATES

If you have any questions regarding this request, please do not hesitate to contact this office so as to ensure that only the necessary electronic email distribution list is duplicated.

Respectfully,

//s// Ben Kirby

Benjamin M. Kirby

HALL & ASSOCIATES

Attachment 1 –

EPA Office of Water’s February 14, 2019 Email - “Announcing EPA’s Water Quality Modeling Webinar: ‘Conestoga River Watershed HSPF and SWAT Modeling’”

From: U.S. EPA Office of Water <epaow@epa.gov>

Sent: Thursday, February 14, 2019 10:54 AM

To: Gary Cohen <gcohen@hall-associates.com>

Subject: Announcing EPA's Water Quality Modeling Webinar: "Conestoga River Watershed HSPF and SWAT Modeling"



EPA's Water Quality Modeling Workgroup is hosting a series of webinars to help water quality professionals better understand surface water quality modeling and how models can be used to solve common problems that face water quality regulators. The webinars are focused on modeling as it applies to the Total Maximum Daily Load (TMDL), Standards, and Water Quality Permitting Programs, but they are applicable to a wide range of audiences. These two hour webinars cover everything from modeling basics (e.g., model setup and calibration) to applied water quality modeling of different pollutants.

The webinar, titled "**Conestoga River Watershed HSPF and SWAT Modeling**", is scheduled for **Tuesday March 12 at 1pm Eastern**. This webinar presents the development and application of watershed models using the Soil and Water Assessment Tool (SWAT) and Hydrologic Simulation Program FORTTRAN (HSPF) for the Conestoga River watershed in Pennsylvania. The novel modeling approach was used to quantify watershed sediment and nutrient sources and impacts of stream restoration. The SWAT model was calibrated and validated for streamflow, sediment and nutrients at the watershed outlet. An HSPF model for the Conestoga River was also developed to quantify legacy sources of sediment and parameterize the in-stream sediment component of the SWAT model. The streamflow and sediment component of the HSPF model were calibrated and validated using the same data used for the evaluation of the SWAT model. Simulations of stream restoration scenarios were completed using the calibrated SWAT model and showed large decreases in delivered sediment and nutrient loads. The results indicate that stream restoration has the potential to reduce sediment and nutrient loads to the Chesapeake Bay.

Registration is required and is now available at:

<https://epawebconferencing.acms.com/conestoga/event/registration.html>. Participants should use their computer speakers to hear webinar audio.

Previous webinars are available here: <https://www.epa.gov/waterdata/surface-water-quality-modeling-training>.

Stay Connected with U.S. EPA Office of Water:



U.S. EPA Office of Water | 1200 Pennsylvania Ave NW, Washington, DC 20460

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Exhibit 3 —

2018 Request Correspondence



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

JUL 30 2018

OFFICE OF WATER

Mr. Benjamin Kirby
Hall & Associates
16201 I Street, NW, Suite 701
Washington, DC 20006-4033

Re: FOIA Request: EPA-HQ-2018-009605

Dear Mr. Tavenor:

This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA) on July 13, 2018, in which you requested the EPA's email distribution list of those in receipt of EPA's July 13, 2018 email with the subject title "Prepare for Harmful Algal Blooms."

Opportunity to Discuss and Modify

The EPA now estimates that the number of the recipient's email addresses on the distribution list is upwards of over 19 thousand addresses. We have two options for approaching your request to ensure that we do not provide private email addresses, which are exempt from FOIA requests, per Exemption 6, 5 U.S.C. § 552(b)(6). Exemption 6 protects information about individuals in personnel files, when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy.

Option No. 1: Physically go through the list and redact all apparent private addresses, but contact those addresses that are not clearly apparent as private. This option would take an enormous amount of labor and we would require an assurance of payment of an estimated cost of \$1,000.00 or more.

Option No. 2: We will identify addresses via the "search and find" automated Excel tool, to identify those known government, industry, associations, academic, other known non-governmental organization or commercial addresses. All remaining addresses would be redacted at the end of the database listing. This operation would take considerably less time and may be provided for your agreed to fee, not to exceed \$100.

Next Steps

The processing clock is stopped for your FOIA request until we receive your clarification or modification.


Please respond within ten calendar days from the date of this letter to arrange a time to discuss your request.

You may contact me at 202-564-5072 or flaharty.stephanie@epa.gov to discuss your request or if you have any further questions. If we do not receive a response from you within this time period, or by Thursday, August 9, 2018, we will consider your request to be voluntarily withdrawn. Once the request

is clarified, we will continue processing your FOIA request and provide you with an estimated timeframe for completion and a fee estimate. If you wish to request information connected to this request in the future, please reference the FOIA request number.

Additionally, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (301) 837-1996 or (877) 684-6448; or fax, (301) 837-0348.

Sincerely,

A handwritten signature in blue ink, appearing to read "Steph. Flaherty", with a stylized flourish at the end.

Stephanie Flaherty
Office of Water, FOIA Public Liaison

Benjamin Kirby

From: Flaharty, Stephanie <Flaharty.Stephanie@epa.gov>
Sent: Tuesday, August 28, 2018 10:16 AM
To: John Hall
Cc: Benjamin Kirby; Erin Thomas
Subject: RE: Request for Clarification

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Mr. Hall,

The Environmental Protection Agency diligently tracks Freedom of Information Act (FOIA) requests to ensure that the Agency responsibly administrates timely transactions. Your request was closed and considered voluntarily withdrawn (on August 13, 2018) because I did not hear back from you within 10 days of the date of my July 30, 2018 request, as I clearly stated in my clarification letter.

If you continue to be interested in the document, you will need to submit a new FOIA request.

Sincerely,

Steph Flaharty
Sr. Reg. Mgr./CMS/FOIA Public Liaison
Office of Ground Water and Drinking Water
202.564.5072

From: John Hall [mailto:jhall@hall-associates.com]
Sent: Wednesday, August 22, 2018 4:05 PM
To: Flaharty, Stephanie <Flaharty.Stephanie@epa.gov>
Cc: Benjamin Kirby <bkirby@hall-associates.com>; Erin Thomas <ethomas@hall-associates.com>
Subject: FW: Request for Clarification

Dear Stephanie

I understand from Ben Kirby that EPA has decided to close out the FOIA request, despite our ongoing discussion over the scope of EPA's application of Exemption 6.

We would ask you to address two points regarding these issues:

1. Under what authority did EPA determine that it would only give H&A 10 days to respond to the Agency's July 30th letter? Is this a statutory or adopted regulatory deadline for responses? If not, we would suggest that EPA does not have authority to simply close out a valid FOIA request pending a response from requestor for failing to respond in 10 days. A follow up email asking about the status of our response would have been the appropriate next step.
2. Please provide the legal basis for EPA to refuse to provide email addresses of non-agency employees under Exemption 6 when EPA is actively using these emails to communicate with parties outside the agency. I would note that EPA does not redact the home addresses of third parties in written communications released by the agency. The email address serves the same purpose for these non-agency employees. Moreover, how can you determine that an email is "private" versus a business email? Many businesses use yahoo, gmail and other non-descript accounts. If an email address is

being used for business purposes or as the means for obtaining information from the agency, it would qualify as a document that must be released under FOIA.

Thank you for your attention to this request. Please note that if the agency refuses to reopen the FOIA and/or refuses to provide the further clarifications sought above to ensure that all requested documents have been released as required by FOIA, we will have no other option than to appeal this entire matter to District Court.

Thanks,

John

John C. Hall
Hall & Associates
1620 I Street, NW, Suite 701
Washington, DC 20006
Phone: 202-463-1166
Fax: 202-463-4207
E-Mail: jhall@hall-associates.com

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From: Benjamin Kirby
Sent: Monday, July 30, 2018 10:28 AM
To: John Hall <jhall@hall-associates.com>
Subject: FW: Request for Clarification

John,

EPA is requesting clarification on how to proceed with our FOIA request seeking:

“An electronic copy of the email distribution list of those in receipt of the July 13, 2018 EPA ‘Prepare for Harmful Algal Blooms’ email.”

For a price assurance of at least \$1000, EPA will manually redact all private email addresses from the ~19,000-long list before release. For a price assurance of \$100, EPA will use an automated “search and find” Excel tool to release “known government, industry, associations, academic, other known non-governmental organization or commercial addresses” while the rest would be redacted.

-Ben

From: flaharty.stephanie@epa.gov <flaharty.stephanie@epa.gov>
Sent: Monday, July 30, 2018 9:17 AM
To: Benjamin Kirby <bkirby@hall-associates.com>
Subject: Request for Clarification

Dear Mr. Kirby,

See attached letter, requesting clarification of your FOIA request.

Stephanie Flaharty



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 30 2018

Mr. Benjamin Kirby
1620 I Street, NW, Suite 701
Washington, D.C. 20006

OFFICE OF
WATER

Re: FOIA Request: EPA-HQ-2018-009605 Closure for Failure to Modify

Dear Mr. Kirby,

This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA or Agency) on July 13, 2018, in which you requested:

An electronic copy of the email distribution list of those in receipt of the July 13, 2018 EPA "Prepare for Harmful Algal Blooms" email.

Your request does not reasonably describe the records in a way that will permit EPA employees to identify and locate them.

EPA's FOIA regulations state:

"Whenever possible, your request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter. If known, you should include any file designations or descriptions for the records that you want. The more specific you are about the records or type of records that you want, the more likely EPA will be able to identify and locate records responsive to your request." 40 C.F.R. § 2.102(c).

We sent you a letter dated July 30, 2018 providing you the opportunity to clarify the records that you are seeking so that EPA can process your request. We asked that you contact us by August 9, 2018, with your clarification, and we have not received additional information from you, so we are administratively closing your request.

As Stephanie Flaharty stated in her August 28, 2018 email to you, the EPA diligently tracks FOIA requests to ensure that the Agency responsibly administers timely transactions. Your request was closed and considered voluntarily withdrawn on August 13, 2018 because we did not hear back from you within 10 days of the date of the July 30, 2018 request, as she clearly stated in the clarification letter.

This letter concludes our response to your request. You may appeal this response by email at hq.foia@epa.gov, or by mail to the EPA's National FOIA Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2310A), Washington, DC 20460 or through FOIAonline if you are an account holder. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1200 Pennsylvania Avenue, N.W., Room 5315, Washington, DC 20460. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals *received* after the 90-calendar-day limit. Appeals

received after 5:00 p.m. EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information

Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.

Sincerely,

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the right.

David Travers, Director
Water Security Division
Office of Ground Water and Drinking Water



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

NOV 06 2018

Mr. Benjamin Kirby
Hall & Associates
1620 I Street, N.W.
Suite 701
Washington, DC 20006-4033

Re: Freedom of Information Act Appeal No. EPA-HQ-2018-011401 (Request No. EPA-HQ-2018-009605)

Dear Mr. Hall:

I am responding to your September 13, 2018 Freedom of Information Act (FOIA) appeal regarding the FOIA request you submitted to EPA on July 13, 2018. Your July 13th request sought a “copy of the email distribution list of those in receipt of the July 13, 2018 EPA ‘prepare for Harmful Algal Blooms’ email.” By letter on July 30, 2018, Stephanie Flaharty, FOIA Public Liaison, Office of Water, explained that the mailing list was over 19,000 email addresses. The letter provided you with two options to process your FOIA request, each with different costs, and explained that private email addresses would be withheld pursuant to Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6). Ms. Flaharty’s letter requested that you contact her to discuss these options by August 9, 2018, or your request would be considered voluntarily withdrawn and closed. EPA did not hear from you and on August 13, 2018, Ms. Flaharty closed your request.

On August 22, 2018, you spoke with Ms. Flaharty, to discuss your FOIA request. During this discussion, you asked Ms. Flaharty to reopen your FOIA request that was closed on August 13, 2018. By letter on August 28, 2018, Ms. Flaharty denied your request to reopen FOIA EPA-HQ-2018-009605 but informed you that you could submit a new FOIA request for the same information.

You now appeal (1) the closure of your FOIA request, (2) the denial of your request to reopen your FOIA request, and (3) the purported redaction of non-agency email addresses pursuant to Exemption 6 of the FOIA. I have carefully considered your request and your appeal. For the reasons set forth below, I have determined that your appeal should be, and is, granted in part and denied in part.

First, in the interest of resolving your FOIA request efficiently, pursuant to 40 C.F.R. § 2.104(k), I am remanding your FOIA request to the Office of Water to reopen the request. Your request provided an assurance of payment up to \$100. The Office of Water will contact you within ten business days and seek a written assurance of payment for the estimated costs of processing your request if it exceeds \$100. *See* 40 C.F.R. § 2.107(e).


Mr. Benjamin Kirby
FOIA Appeal No. EPA-HQ-2018-011401
Page 2

Regarding your Exemption 6 challenge, EPA has not made an initial denial pursuant to 40 C.F.R. 2.104(h) to withhold any information. Under EPA's FOIA regulations, an initial denial to withhold information must be made by an EPA manager no lower than a Division Director or the equivalent. Therefore, your exemption 6 challenge is not ripe at this time.

When applying Exemption 6, the program will weigh the privacy interest and the public interest, which is the extent to which the information sheds light on EPA's performance of its statutory duties. In evaluating the privacy interest, the program may consider the potential harm to individuals that may result from the disclosure of their email addresses, individually or in list form, in the form of harassment and unsolicited contact or solicitations. The privacy interest of the individuals should be weighed against the extent to which the information in the mailing list sheds light on EPA's performance of its statutory duties. Because EPA must perform this evaluation of records to assess the applicability of Exemption 6 to this information, its cost estimate necessarily will include review time. As indicated above, the Office of Water will provide you with a revised cost estimate for processing your request.

This letter constitutes EPA's final determination on this matter. Pursuant to 5 U.S.C. § 552(a)(4)(B), you may obtain judicial review of this determination by filing a complaint in the United States District Court for the district in which you reside or have your principal place of business, or the district in which the records are situated, or in the District of Columbia. Additionally, as part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) within the National Archives and Records Administration was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; e-mail, ogis@nara.gov; 202-741-5770 or 1-877-684-6448; and fax, 202-741-5769.

Should you have any questions concerning this matter, please contact Matt Schwarz at schwarz.matthew@epa.gov or (202) 564-5654.

Sincerely,

for Kevin Miller
Assistant General Counsel
General Law Office

cc: Office of Water



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 19 2018

Mr. Benjamin Kirby
Hall & Associates
16201 I Street, Suite 701
Washington D.C. 20006-4033

OFFICE OF
WATER

Re: FOIA Request: EPA-HQ-2018-009605 – Assurance of Payment

Dear Mr. Kirby,

This letter concerns the above referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA) on July 13, 2018, in which you requested the EPA's email distribution list of those in receipt of EPA's July 13, 2018, email with the subject line "Prepare for Harmful Algal Blooms."

The EPA estimates that the number of the recipient's email address on the distribution list is upwards of 19,000 addresses. However, per Exemption 6, U.S.C. §552 (b)(6), we will review for any domains that are traditionally used to host personal email addresses, such as gmail.com, Hotmail.com, yahoo.com, aol.com, etc., and redact those addresses we determine to be private as disclosure would constitute an unwarranted invasion of personal privacy. We estimate the fee for this response to be no higher than \$300. **Since you have indicated a willingness to pay a \$100 fee limit, we will require a written assurance of payment of the estimated fee of \$300. Please respond within 10 calendar days from the date of this letter with an email assuring us of payment or if you wish to arrange a time to discuss the request further.**

You may contact me at flaharty.stephanie@epa.com to provide the assurance of payment or to discuss your request. If we do not receive a response from you within the time period, or by November 29, 2019, we will consider your request to be voluntarily withdrawn. Once we receive your assurance of payment, we will continue processing your FOIA request and provide you with an estimated timeframe for completion. If you wish to request information connected to this request in the future, please reference the FOIA request number.

Additionally, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667 or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, Maryland 20740-6001; email at ogis@nara.gov; telephone at (301) 837-1996 or (877) 684-6448; or fax at (301) 837-0348.

Sincerely,

Stephanie Flaharty
Office of Water, FOIA Public Liaison

Exhibit 4 —

2018 Request Administrative Appeal

HALL & ASSOCIATES

1620 I Street, NW
Suite 701
Washington, DC 20006-4033
Telephone: (202) 463-1166 Web: <http://www.hall-associates.com> Fax: (202) 463-4207
Email: jhall@hall-associates.com

January 29, 2019

Via Email

National Freedom of Information Officer
hq.foia@epa.gov
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

RE: Second Appeal of FOIA EPA-HQ-2018-009605

To Whom This May Concern:

The letter constitutes an appeal of EPA's excessive fee assurance request and refusal to timely process the above-referenced pending FOIA request from Hall & Associates (H&A). The basis of this appeal is discussed below.

On July 13, 2018, EPA's Water Security Division distributed an email with subject line "Prepare for Harmful Algal Blooms." On July 13, 2018, Hall & Associates (H&A) submitted FOIA Request EPA-HQ-2018-009605 (Attachment 1) seeking:

An electronic copy of the email distribution list of those in receipt of the July 13, 2018 EPA "Prepare for Harmful Algal Blooms" email.

On July 30, 2018, H&A received EPA's clarification request letter (Attachment 2) providing two options for continued processing of the FOIA request, noting that EPA does "not provide private email addresses, which are exempt from FOIA requests, per Exception 6, 5 U.S.C. § 552(b)(6). Exemption 6 only protects information about individuals in personnel files, when the disclosure of such information would constitute a *clearly unwarranted* invasion of personal privacy." (emphasis supplied). It was not apparent from EPA's correspondence how the Agency could identify "private" emails used by EPA to transmit regulatory notices to third parties outside the Agency as a "clearly unwarranted" intrusion nor was there any explanation of why EPA considered Exemption 6 applicable to any email address the Agency classified as "private" which EPA already uses to transmit regulatory matters. EPA also claimed it would charge H&A over \$1000 if a manual review of the list was required to eliminate private emails. The letter, which raised a number of complex unanswered questions, also provided:

HALL & ASSOCIATES

Please respond within ten calendar days from the date of this letter to arrange a time to discuss your request. [] If we do not receive a response from you within this time period, or by Thursday, August 9, 2018, we will consider your request to be voluntarily withdrawn.

After noticing that the FOIA request status was closed on FOIA Online, on August 22, 2018, H&A spoke with Ms. Stephanie Flaharty (EPA Sr. Reg. Mgr./CMS/FOIA Public Liaison) to obtain some basic information needed to rationally respond to EPA's letter (e.g., on what basis are emails considered private by EPA, what analysis indicates all "private" emails are subject to Exemption 6, and whether EPA regularly uses these email addresses to communicate with parties outside the Agency – which would certainly indicate that there was no expectation of privacy). In discussing this FOIA request, Ms. Flaharty reiterated that all private email addresses would be redacted in a response under FOIA Exemption 6. H&A then requested 1) that the request be reopened, 2) the legal or regulatory basis for EPA's 10-day deadline for closing out FOIA requests, and 3) the legal basis for EPA's refusal to provide email addresses of non-agency employees under FOIA Exemption 6.

On August 28, 2018, H&A received EPA's response email (Attachment 3) denying H&A's request for reopening while failing to address or acknowledge H&A's other inquiries:

Your request was closed and considered voluntarily withdrawn (on August 13, 2018) because I did not hear back from you within 10 days of the date of my July 30, 2018 request, as I clearly stated in my clarification letter.

If you continue to be interested in the document, you will need to submit a new FOIA request.

On August 31, 2018, H&A received EPA's August 30, 2018 letter formally transmitting EPA's closing of this FOIA matter (Attachment 4). On September 13, 2018, H&A appealed 1) EPA's decision to close the FOIA request despite objections from H&A, and 2) EPA's assertion that it would redact all private email addresses in the FOIA response, citing to FOIA Exemption 6 (Attachment 5). After repeated inquiries regarding the status of EPA's appeal determination, EPA's FOIA officer indicated the appeal determination would be complete around October 29, 2018. EPA's November 6, 2018 appeal determination 1) granted H&A's request to reopen the FOIA matter and indicated that "The Office of Water will contact you within ten business days and seek a written assurance of payment for estimated costs of processing your request if it exceeds \$100" and 2) denied H&A's Exemption 6 challenge as no information had yet been withheld (Attachment 6). On November 19, 2018, H&A received EPA's revised assurance of payment, providing (Attachment 7):

The EPA estimates that the number of the recipient's email address on the distribution list is upwards of 19,000 addresses. However, per Exemption 6, U.S.C. §552 (b)(6), we will review for any domains that are traditionally used to host personal email addresses, such as gmail.com, Hotmail.com, yahoo.com,

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aol.com, etc., and redact those addresses we determine to be private as disclosure would constitute an unwarranted invasion of personal privacy. We estimate the fee for this response to be no higher than \$300.

On December 6, 2018, H&A responded via email that H&A continues “to disagree with EPA’s position that, in response to our specific request, redacting any emails is appropriate under FOIA and accordingly disagree with EPA’s fee assessment. As we have previously stated, we do not agree that the release of private emails, in the context of this request, constitutes an invasion of privacy.” On December 19, 2018, EPA, in receipt of the December 6 email, estimated that the Agency would respond by January 10, 2019. No EPA response has been received to date.

Pursuant to 40 C.F.R. § 2.104(j), H&A hereby appeals EPA’s failure to process H&A’s FOIA Request EPA-HQ-2018-009605. Specifically, H&A appeals as arbitrary and capricious 1) EPA’s assertion that it would redact all private email addresses in the FOIA response, citing to FOIA Exemption 6, 2) EPA’s excessive fee assessment, and 3) EPA’s refusal to continue processing this FOIA after repeated requests.

EPA has refused to release any mailing list email addresses that the Agency designates as private, under the claim that FOIA Exemption 6 precludes the release of any private email address, even when EPA is using those addresses to communicate with third parties outside the Agency. H&A disagrees that EPA is even capable of identifying private email addresses based exclusively on the local-part (e.g., bkirby) and domain (e.g., gmail.com) and disagrees that, even if private email addresses are accurately identified, any email addresses should be redacted. Many businesses use Yahoo, Gmail, and other common, non-descript email domains, and the Agency cannot differentiate between a private versus business email simply because a Gmail, Yahoo, or Hotmail domain is used. Furthermore, under *AquAlliance v. United States Army Corps of Eng’rs*, 243 F. Supp. 3d 193 (D.D.C. 2017), EPA must demonstrate that there is a specific privacy expectation to refuse to release an email address. EPA has plainly conducted no such analysis and refusing to provide an email distribution list under a blanket claim of Exemption 6 privilege is improper.

Moreover, EPA lacks a legal basis to refuse to provide email addresses of non-agency employees under Exemption 6 when EPA is actively using these emails to communicate with parties outside the Agency. We note that 1) in previous EPA FOIA responses (e.g., EPA-HQ-2016-004090, EPA-HQ-2017-000184, EPA-HQ-2018-004697, EPA-HQ-2018-004700), EPA has not redacted email addresses from, for examples, gmail.com or verizon.net domains, and 2) EPA does not redact the home addresses of third parties in written communications released by the Agency. The email address serves the same purpose for these non-agency employees. However, the obvious difference is that disclosure of a home address could allow for actual physical contact while disclosure of an email address could not. Accordingly, if physical home addresses are disclosed publicly by the Agency, refusal to release an email address is not defensible.

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Because no email addresses should be redacted, H&A disagrees with EPA's November 19, 2018 fee assessment that was based on reviewing and redacting email addresses, and therefore the fee assessment must be reduced.

Based on the forgoing, EPA should release all of the email addresses contained in the distribution list, as requested, and revise the November 19, 2018 fee assessment accordingly. If EPA does not process this FOIA as originally worded and release any responsive documents with a revised fee assessment, H&A will have no other recourse but to pursue such relief in federal court.

Respectfully,

//s// Benjamin M. Kirby

Ben Kirby